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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. TORIANO BENFORD, Defendant and Appellant.	B281977 (Los Angeles County Super. Ct. No. YA091417)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Toriano Benford of the first degree murder of Earnest Brannon. (Pen. Code, § 187, subd. (a).)[1] The trial court found true the allegations that he had previously been convicted of two prior strikes (§§ 667, subd. (b)–(i), 1170.12, subd. (a)–(d)) and two prior serious felonies (§ 667, subd. (a)). The court sentenced him to 85 years to life in state prison. On appeal, he contends that: (1) there is insufficient evidence of premeditation and deliberation; (2) the trial court erred in not instructing on voluntary manslaughter; (3) his trial counsel was ineffective for not requesting CALCRIM No. 522; and (4) he is entitled to a remand for the trial court to consider whether to strike his section 667, subdivision (a) enhancements, and to consider whether to permit him to participated in mental health diversion. We disagree with all his contentions, and affirm the judgment.

BACKGROUND

Prosecution Evidence

1. *The Murder*

In early February 2014, appellant (43 years of age) was released from the Penn Mar mental institution, and began treatment at D.D. Hirsch, a mental health and addiction treatment facility. Through his case worker, Legran Holly, he sublet a room at the home of Denise Nelson on West 98th Street in Los Angeles. The house had three bedrooms. Nelson lived in the northeast bedroom. Appellant shared the southwest bedroom with another sublessee, the murder victim, 67-

[1] Unspecified section codes refer to the Penal Code.

year-old Earnest Brannon. The northwest bedroom was occupied by Julian Green, who departed shortly after appellant moved in.

Brannon weighed only 110 or 120 pounds and was not confrontational. By early March 2014, he was fearful of appellant. He told his brother Charles that appellant bullied him and was demanding money.[2] According to Charles, Brannon appeared nervous in appellant's presence.

Appellant once complained to Julian Green that he and Brannon (whom he called "white boy") should be in separate rooms. Around March 2, 2014, appellant asked Denise Nelson for his own room. She said that she would contact D.D. Hirsch, which was paying appellant's rent, to see if the organization would pay the additional cost.

When Legran Holly, appellant's case worker, visited appellant on March 7, 2014, appellant was intoxicated. He told Holly that he did not like Brannon (he had complained about him before), and said that he could have "fucked him up a long time ago," but refrained out of respect for Nelson. Appellant also expressed anger about his girlfriend and not having received his public assistance money and food stamps. Before she left, Holly checked on appellant's public assistance benefits, and found that he had received all he was due. Upon learning that, appellant became even more angry.

Brannon was murdered two days later, on March 9, 2014. The circumstances surrounding the death were as follows.

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[2] This testimony was not offered for the truth of whether appellant had demanded money from Brannon, but rather to demonstrate Brannon's subjective state of mind toward appellant.

Around 7:00 a.m., Denise Nelson observed Brannon at home drinking coffee, getting ready for church. Around 9:00 a.m., Pastor Arthur Boone, and his wife, Annie Boone, picked up Brannon and took him to church, a drive of about 15 minutes. Later that day, sometime between 11:00 a.m. and noon, Nelson, who was leaving to meet Julian Green, saw appellant in the kitchen and they exchanged pleasantries. Nelson observed no one else at the house.

At approximately 1:00 or 2:00 p.m., Brannon's girlfriend, Danisha Goodman, called Brannon on his cell phone. Brannon said he was in church and would call her when he returned home. According to cell phone data Brannon's phone was located in the vicinity of the church when it called Annie's phone at 2:00 p.m.

After the church services ended around 2:00 p.m., Annie Boone (the pastor's wife) and another female churchgoer drove Brannon home. When Annie dropped Brannon off, appellant was standing near the security gate of the house and asked the two women how they were doing.

Beginning at 2:34 p.m., after Brannon was dropped off, appellant's phone made four calls, the last at 2:46 p.m. For all these calls, the phone was either in the vicinity of the house where he lived with Brannon, or Red's Liquor store on Century Boulevard, two blocks away.

Around the time of these phone calls, appellant appeared on surveillance video at Red's Liquor. The video was viewed by Sergeant William Cotter and played at trial. The video showed appellant entering Red's Liquor at 2:32 p.m., purchasing an item, standing for a few moments, and then leaving. At 2:40 p.m., appellant again was

recorded in the store. At 2:44 p.m., he appeared to be shuffling papers or counting money. Appellant left the store again at 2:45 p.m.

At approximately 8:45 p.m., Brannon's girlfriend Danisha Goodman, who still had not spoken to Brannon, called him. There was no answer.

At approximately 10:00 p.m. that night, Nelson returned home. The security door to the house was closed, but the front door was ajar (it was often left open for air circulation). Once inside, Nelson observed that the door to her bedroom was damaged and open (she had locked it before she left) and her room had been ransacked. The door to the vacant room formerly occupied by Julian Green (the northwest bedroom) was ajar. Nelson entered, and saw Brannon lying on the floor.

Nelson ran to the home of her neighbor Willie Miller. She was hysterical and said there was a body in her house. Miller entered Nelson's house and found Brannon lying on his back in the northwest bedroom with his throat cut. Both his pants pockets were turned inside out. Miller called 911, and several minutes later, emergency and police personnel arrived.

Brannon was dead at the scene. Nelson later determined that her cash and credit cards were missing, but nothing else had been stolen.

2. *Appellant's Whereabouts*

Around 3:00 p.m., after being last depicted in the Red's Liquor surveillance video at 2:45 p.m., appellant arrived unexpectedly at the home of his niece, Jazmine Richardson, at 2111 West 81st Street, where

she lived with appellant's mother (Jazmine's grandmother), Cynthia Myers. According to Jazmine, appellant was sweating and acting "weird" and "fidgety." He was wearing a tank top, which looked wrinkled and dirty, and black cargo shorts.

Appellant used his mother's asthma "breathing machine" (appellant also had asthma), and then asked Jazmine for one of his mother's tank tops. He left after being there for only about 10 minutes.

Around dusk, Denise Nelson received a phone call from appellant. He said that he was going to his mother's house and asked Nelson to tell Holly from D.D. Hirsch that he would be there if she was looking for him. Nelson found the call unusual because appellant had Holly's number, and had never made such a request of her before.

Around 8:00 p.m., appellant called his mother and told her he was coming over to spend the night. She agreed. Between 8:07 and 8:35 p.m., appellant's phone was located near the Hollywood Park Casino. He then arrived at his mother's home at approximately 9:00 p.m. He made several calls between 9:44 and 9:57 p.m., all of which were made from the vicinity of his mother's home. He was arrested there later that night.

3. *Cause of Death*

Deputy Medical Examiner Ogbonna Chinwah performed Brannon's autopsy. It revealed that although Brannon had a cut across the center of his throat, which was inflicted while he was alive and around the time of death, it did not contribute to death. It was a large cut, six inches long, approximately one-quarter inch deep at the edges,

and one-half inch deep at center of the throat, consistent with having been inflicted by a knife. It was not a superficial wound: if the deeper penetration had been on the sides of the neck, where the carotid artery and jugular vein are located, rather than the center of the throat, it would have severed those vessels. As it was, it missed them and did not contribute to his death.

Rather, the cause of death was strangulation. Brannon's eyes had petechial hemorrhages, and the hyoid bone and thyroid cartilage in his throat were fractured, caused by compression of the neck. Because the neck showed no ligature marks, the compression was likely by hand. Strangulation causes death by starving the brain of blood and oxygen. The compression must be tight enough to compromise blood flow to the brain, and last long enough for that to occur. Then, within a few seconds, the victim will pass out and die.

Brannon also had various cuts to the face, and defensive wounds to the hands.

4. *The Crime Scene Evaluation*

In the living room of Nelson's house, there was a broken trophy that appeared out of place. Bits of the trophy were scattered across the floor. In the kitchen, one of Nelson's jars was also broken.

Sergeant Cotter and Forensic Specialist Yvette Gonzalez noticed oddities at the scene not consistent with a break-in. The room occupied by Brannon and appellant (the southwest bedroom) had been ransacked. The dead bolt on the door (the only lock) was damaged, and the door was protruding outward, meaning that the door was damaged

by a blow from inside the room, not from the outside. Further, none of the windows in the house or exterior doors showed signs of forced entry.

In the kitchen, there was a broken ceramic container lid, and a piece of the broken container in the doorway of the bedroom where Brannon's body was found. A blood trail led from the refrigerator to his bedroom. The hinges of the door to that bedroom had been pulled out of the wall. In the room were smears of blood on a wall, the closet, and the carpet around Brannon's body.

5. *DNA Analysis*

DNA blood testing revealed the following. Appellant's hands had invisible traces of blood, and he had a wound to his right triceps. As to the blood in that wound, appellant was a major contributor, and Brannon was a minor contributor, with a DNA profile match of one in 1.4 quintillion.

When arrested, appellant's shirt was visibly blood stained. As to one stain, Brannon was the major contributor, with a DNA profile match of one in 1.72 sextillion.

In the bedroom where Brannon's body was found, there was a spatter-type blood stain on the closet, indicating that the blood moved through the air before hitting the closet. The blood was a match for Brannon's, as was the blood on several other bloodstains in the bedroom. On the kitchen floor just outside the bedroom was a "drip"-type bloodstain that matched Brannon's DNA.

There was DNA material under Brannon's fingernails. Appellant was a minor contributor, with a DNA match of one in 135 quadrillion.

The presence of the DNA could not be explained merely by Brannon having touched appellant, but rather only by Brannon using his fingernails with force.

Defense Evidence

Brannon's brother Charles did not tell the police that Brannon said he was in fear for his life.

DISCUSSION

I. *Substantial Evidence*

Appellant contends that the evidence is insufficient to support a finding of premeditation and deliberation as required for first degree murder. We conclude that there is more than ample evidence of premeditation and deliberation. Of course, we review the entire record under the substantial evidence test: "'The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] 'Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due

deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder. [Citations.]'" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

The legal requirements of premeditation and deliberation are well-established. "'In the context of first degree murder, premeditation means "'considered beforehand'" [citation] and deliberation means a "'careful weighing of considerations in forming a course of action . . .'" [citation]. "The process of premeditation and deliberation does not require any extended period of time." [Citation.] "'Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .'" [Citations.]" (*People v. Salazar* (2016) 63 Cal.4th 214, 245.)

As our Supreme court has noted: "'In [*People v. Anderson* (1968) 70 Cal.2d 15], we "identified three categories of evidence relevant to resolving the issue of premeditation and deliberation: planning activity, motive, and manner of killing." [Citation.] However, these factors are not exclusive, nor are they invariably determinative. [Citation.] "'*Anderson* was simply intended to guide an appellate court's assessment whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. [Citation.]'" [Citation.]" (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

Here, the evidence supports each of the *Anderson* factors.

As for motive, appellant did not like Brannon, had complained about having to share a room with him, and on March 7, 2014, two days

before the murder, told Holly that he could have "fucked him [Brannon] up a long time ago," but had refrained out of respect for Nelson. That same day, appellant expressed concern to Holly about money. He was angry because he believed that he had not received the public assistance money and food stamps to which he was entitled, and became even more angry when Holly informed him that had received all he was due. Two days later, most likely after the murder occurred, video surveillance showed appellant at Red's Liquor Store, near Nelson's house, buying items and shuffling some papers as if counting money. Appellant's dual motives–dislike of Brannon, and intent to rob him–are strong evidence suggesting a deliberate intent to kill. (See *People v. Koontz* (2002) 27 Cal.4th 1041, 1082 [motive to effectuate a robbery of roommate supported finding of premeditation and deliberation].)

Considering evidence of planning, appellant was present at the house when Brannon was dropped off after church. Nelson was not there, and appellant was alone with Brannon. From this evidence, it could be inferred that appellant waited for the right opportunity to rob and kill Brannon without any witness present. Further, the circumstantial evidence of the attack suggested a relentless pursuit of Brannon in an effort to kill him, with more than enough time for appellant to consider his actions. The attack likely began in the room they shared. That room was in disarray, and the door to that room was broken from the inside out, suggesting that Brannon was able to break out of the room after initially being attacked. The presence of Brannon's blood on the kitchen floor, and the pieces of the broken

trophy and jar on the floor, indicated that Brannon and appellant struggled in the kitchen, and that appellant cut Brannon's throat with a sharp object. However, consistent with the evidence, Brannon (his throat cut and bleeding) was able to escape to the vacant bedroom (where his body was later found). Appellant forced his way in: the door was forced open from the outside, off its hinges. That is where appellant strangled Brannon to death. Based on this evidence, appellant planned to rob and kill Brannon when they were alone at the house, consciously pursued Brannon with the intent to kill him, cut his throat (insufficiently to kill him), and ultimately settled on strangulation (which did kill him).

Finally, as for the nature of the killing, appellant tried two methods to kill Brannon, each of which disclosed a considered intent to kill, even though only the second (strangulation) was successful. First, appellant tried to kill Brannon by cutting his throat, inflicting a wound across Brannon's neck. The wound was not superficial; it could have been fatal had it been placed differently, with the deeper penetration on the sides of the neck rather than in the center of the throat. It may reasonably be inferred that appellant deliberately chose that method to kill Brannon, but missed the mark.

Brannon escaped, and appellant then shifted to an even more deliberate method: manual strangulation. Appellant's compression of Brannon's neck fractured his hyoid bone and thyroid cartilage, and lasted long enough to compromise the blood flow to the brain, after which, within a few seconds, Brannon passed out and then died.

That appellant attempted two methods of killing Brannon, separated in time and each strongly suggestive of deliberate intent, leaves little doubt that when he finally killed Brannon by manual strangulation he did so with a deliberate and premeditated intent to kill. (*People v. Davis* (1995) 10 Cal.4th 463, 510 [rational trier of fact could find premeditation based on defendant's pursuit of severely injured victim after car accident and strangulation of her].)

Appellant analogizes this case to *People v. Boatman* (2013) 221 Cal.App.4th 1253. There, the defendant killed his girlfriend by shooting her in the face. No witnesses were present, and there was no evidence of motive or planning activity. The Court of Appeal found insufficient evidence to support a finding of premeditation and deliberation, and reduced the conviction to second degree murder. Obviously, *Boatman* is inapposite to the present case, where there was strong evidence of all three *Anderson* categories.

II. *Voluntary Manslaughter*

Appellant contends that the trial court erred in refusing his attorney's request to request to instruct the jury on voluntary manslaughter based on heat of passion. We disagree.

Under the heat of passion theory, a murder may be reduced to voluntary manslaughter "'if the victim engaged in provocative conduct that would cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection.' [Citation.] [¶] Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been sufficiently provocative to cause an

ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citation.] . . . . [Citation.] [¶] Subjectively, 'the accused must be shown to have killed while under "the actual influence of a strong passion" induced by such provocation. [Citation.] "Heat of passion arises when 'at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.'"" (*People v. Enraca* (2012) 53 Cal.4th 735, 759.)

Appellant contends, in substance, that an instruction on heat-of-passion manslaughter was required because it could be inferred from the evidence that he and Brannon had a physical confrontation, and that the confrontation (given the cell phone and video evidence) likely happened in the short period between Brannon being dropped off from church and appellant leaving for the liquor store. Appellant adds that from the fact appellant seemed cordial and friendly when Brannon was dropped off, and from the damaged condition of the house and signs of a struggle, it could be inferred that Brannon did something that provoked appellant to react suddenly and rashly, and that appellant was acting out of extreme emotion when he strangled Brannon to death.

The problem with appellant's analysis is that the trial court need only instruct on lesser included offenses (whether requested or not) if there is substantial evidence to support the instruction. (*People v. Souza* (2012) 54 Cal.4th 90, 116.) "Substantial evidence is evidence from which a jury could conclude beyond a reasonable doubt that the

lesser offense was committed. [Citations.] Speculative, minimal, or insubstantial evidence is insufficient to require an instruction on a lesser included offense. [Citations.]" (*People v. Simon* (2016) 1 Cal.5th 98, 132.)

Here, missing from the record is any evidence from which a reasonable jury could conclude that: (1) Brannon committed a provocative act of any kind, (2) the act (whatever it purportedly was) was objectively such as to cause an ordinary person with an average disposition to act rashly or without due deliberation and reflection, or (3) assuming that the unknown act was objectively provocative, appellant strangled Brannon to death while actually under the influence of a strong passion induced by the supposed provocative act. Appellant's chain of speculation is woefully insufficient to show that he was entitled to an instruction on voluntary manslaughter.

III. *Ineffective Assistance*

Appellant contends that his trial attorney was ineffective, because he did not request that the trial court give CALCRIM No. 522, which states in relevant part that "[p]rovocation may reduce a murder from first degree to second degree," and that "[i]f you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder." Recognizing that there is no sua sponte duty to instruct the jury on this issue (*People v. Rogers* (2006) 39 Cal.4th 826, 877-880), appellant contends that his counsel was ineffective for failing to request the instruction. However, as we have explained, there was no evidence

that Brannon committed a provocative act. Thus, defense counsel's failure to request the instruction was not objectively unreasonable (there was nothing in the evidence to support the instruction), and, even if he had requested it, there is no reasonable probability that the instruction would have been given or (if given) would have made any difference in the verdict. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694 [setting forth dual prongs of ineffective assistance claim].)

IV. *Remand*

Appellant contends that his case must be remanded based on two legislative changes made after his sentencing. We discuss each in turn, and conclude that appellant is not entitled to a remand.

Discretion to Strike Section 667, Subdivision (a) Enhancements

Appellant's sentence includes a consecutive five-year enhancement for each of his two prior serious felony convictions under section 667, subdivision (a). He contends that he is entitled to a remand based on the enactment of Senate Bill No. 1393, effective January 1, 2019, which deleted former subdivision (b) of section 1385, thereby giving the trial court the discretion (which it previously did not have) to strike the enhancements under section 667, subdivision (a). Because appellant's case is not final on appeal, the legislation applies retroactively to his case. However, that does not mean he is necessarily entitled to a remand.

In the analogous situation involving the enactment of Senate Bill No. 620, which gave the trial court discretion to strike firearm

enhancements under section 12022.5 and 12022.53, courts have held that a remand to allow the trial court to exercise that discretion "is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; see *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-428; *People v. Chavez* (2018) 22 Cal.App.5th 663, 713; *People v. McVey* (2018) 24 Cal.App.5th 405, 419.) Here, the record contains such a clear declaration.

At the sentencing hearing, the trial court observed: "What I observed from this trial is that this defendant just demonstrated extreme callousness and complete lack of conscience." Defense counsel interrupted to note that the only discretion the court had in sentencing defendant was to strike appellant's two prior strike convictions. He proceeded to ask the court to do so, so as to reduce appellant's sentence to 35 years to life. The court responded: "So to do what you just asked I would have to explore his criminal history, the circumstances of the present offense and his likelihood of his promise for the future. So with his two prior convictions for robbery and the current incident involving a callous and unnecessary murder, tell me how he falls outside the spirit of the three strikes law." Defense counsel submitted without further argument. The court then stated "Mr. Toriano Benford is . . . one of the poster children for the three strikes law. He's demonstrated that he commits crimes, he victimizes people, he's done it throughout

his entire life. There is no basis on which to strike the strike." The court then sentenced defendant to 25 years-to-life for first degree murder, tripled under the three strikes law to 75 years-to-life, plus five years each for his two prior serious felonies under section 667, subdivision (a), for a total of 85 years-to-life.

In referring to appellant's life spent committing crimes and victimizing people, the court was accurately describing appellant's criminal record, which began in 1985 with a sustained juvenile petition for burglary (§ 459). In 1986, he had two more sustained juvenile petitions, one for transportation of marijuana (Health & Saf. Code, § 11360, subd. (a)), and one for burglary (§ 459). In 1987, he had a sustained juvenile petition for grand theft auto (§ 487.3). In 1988, he violated his probation, and was sent to the California Youth authority. Paroled in 1989, he violated parole and was returned in 1989. He was discharged from parole in 1991, and in 1992 was convicted in two separate cases of, respectively, selling narcotics (Health & Saf. Code, § 11352, subd. (a)) and robbery (§ 211). Sentenced to concurrent terms of three years in prison, after his release he was convicted in 1994 of robbery (§ 211), and sentenced to ten years in prison. In 1999, he was convicted of being a felon in possession of a firearm (former § 12020, subd. (a)), and sentenced to five years in prison. In 2004, he was convicted again of the same offense and sentenced to another term of five years in prison. After his release, he was convicted in 2010, and again in 2013, of misdemeanor driving under the influence. He later violated his probation for the latter offense.

We conclude on this record that a remand would be a useless act. Put simply, the court described the instant crime, without exaggeration, as an "unnecessary" murder demonstrating "extreme callousness and complete lack of conscience." It described defendant (again, without exaggeration) as a "poster child[] for the three strikes law" with a lifetime spent committing crimes and victimizing people. The court sentenced defendant to a term of 85 years-to-life, declining to strike even one strike. This record clearly indicates that the court found nothing mitigating about the defendant's crime or background, and on remand would not exercise leniency to strike one or both of the section 667, subdivision (a) enhancements.

Mental Health Diversion

Appellant contends that his case should be conditionally reversed and remanded for the trial court to consider whether to permit him to participate in a newly-enacted program of mental health diversion. He argues that the record shows he suffered from a mental illness that may have contributed to the murder. We find no reason to remand.

Effective June 27, 2018, the Legislature created a new pretrial diversion program for defendants suffering from a qualifying mental disorder. (§ 1001.36, subds. (a) & (b)(1).) One of the purposes of the legislation was to promote "[i]ncreased diversion of individuals with mental disorders . . . while protecting public safety." (§ 1001.35, subd. (a).) "'[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication."

(§ 1001.36, subd. (c).) A trial court may grant pretrial diversion if all the following eligibility criteria are satisfied: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder; (2) the "mental disorder played a significant role in the commission of the charged offense"; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).)

On September 30, 2018, the Legislature amended section 1001.36, effective January 1, 2019, to eliminate a defendant's eligibility for diversion if the defendant is charged with certain offenses, including murder. (§ 1001.36, subd. (b)(2).)

Citing *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*), appellant contends that section 1001.36 applies retroactively and we must remand the matter to the trial court for a mental health diversion eligibility hearing. He also contends that amended section 1001.36, which precludes defendants charged with murder from being eligible for diversion, should only apply prospectively.

Respondent contends that section 1001.36 is not retroactive, that *Frahs* was wrongly decided, and that under amended section 1001.36 appellant's murder conviction renders him ineligible for diversion. Further, respondent contends that even assuming section 1001.36 is retroactive and amended section 1001.36 applies prospectively, remand would be futile because the trial court would inevitably find that

appellant poses an unreasonable risk of danger to public safety. We agree with this latter contention.

For purposes of analysis, we will assume without deciding that section 1001.36 applies retroactively. We will also assume without deciding that amended section 1001.36 applies prospectively and that appellant's murder conviction does not render him ineligible for diversion. Nonetheless, based on the record, we are convinced that the trial court would not grant appellant mental health diversion because he poses an unreasonable risk of danger to public safety.

Among other criteria that must be met before a trial court may grant mental health diversion, the statute requires that the court be "satisfied that the defendant will not pose an unreasonable risk of danger to public safety, as defined in Section 1170.18, if treated in the community." (§ 1001.36, subd. (b)(1)(F).) In making this determination, a court "may consider the opinions of the district attorney, the defense, or a qualified mental health expert, and may consider the defendant's violence and criminal history, the current charged offense, and any other factors that the court deems appropriate." (*Ibid.*)

Here, as we have explained, the court (in denying appellant's motion to strike his prior strikes) accurately described the instant crime as an "unnecessary" murder demonstrating "extreme callousness and complete lack of conscience." It accurately described appellant as a "poster child[] for the three strikes law" with a lifetime spent committing crimes and victimizing people. The court sentenced appellant to a term of 85 years-to-life, declining to strike even one strike. Finally, we note that appellant was in an outpatient mental

health program when he committed the murder, and thus has already demonstrated that he would pose "an unreasonable risk of danger to public safety . . . if treated in the community." (§ 1001.36, subd. (b)(1)(F).) On this record, we decline to remand the matter to the trial court for a mental health diversion eligibility hearing. As is the case with appellant's request that we remand the case for the trial court to exercise its discretion to consider striking his section 667, subdivision (a) enhancements, a remand for the trial court to consider allowing defendant to participate in mental health diversion would be a futile act.

DISPOSITON

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P. J.

We concur:

COLLINS, J.

MICON, J.*

*Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.